STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 287997 Calhoun Circuit Court
MICHAEL ANTHONY THOMPSON, Defendant-Appellant.	LC No. 2008-001187-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a), criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a), and three counts of child sexually abusive material, MCL 750.145c(2). Defendant was sentenced to prison terms of 25 to 45 years for CSC I, 71 to 180 months for CSC II, and 85 to 240 months for child sexually abusive material. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant used a camera to take nude pictures of his girlfriend's 12-year-old daughter. It is undisputed that defendant inappropriately touched the girl. Defendant denied, however, that he digitally penetrated complainant. Further, he argues that the evidence on this issue was insufficient.

"When determining if sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution. It must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required." *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can fairly be drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

MCL 750.520a(r) provides: "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any other intrusion, however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is

not required." (Emphasis added.) This includes penetration of the labia majora. *People v Bristol*, 115 Mich App 236, 238; 320 N.W.2d 229 (1981).

Complainant testified that defendant "basically" was "playing with [her] pubic hairs" but at one point "his finger went between my--where I go to the bathroom, my vagina." She had previously described the touching as not "up in" but moving his finger along the outside of the vagina between the "fleshy areas." She said that it lasted minutes and felt "really awkward." In a video recording, defendant denied touching complainant's vagina or parting the lips of the labia. However, based on complainant's testimony, especially the comment that defendant moved his finger along the outside of the vagina "between" the "fleshy areas," and that the episode lasted for minutes, a rational jury could infer that he penetrated her labia.

Defendant next argues that he was afforded ineffective assistance of counsel because his attorney categorically represented in opening statement that defendant would testify and then did not call defendant as a witness. Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To justify reversal based on ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, overcoming a strong presumption that counsel's performance constituted sound trial strategy, and then the defendant must establish that the deficient performance prejudiced the defense, i.e., a showing that there existed a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Following this Court's order remanding the case for an evidentiary hearing, the trial court concluded in a written opinion that counsel's performance was not deficient. We agree with the assessment and reasoning of the trial court as reflected in its opinion. Moreover, even assuming that counsel's performance was deficient, defendant has not established the requisite prejudice. The jury heard from defendant by way of a video recording of a police interrogation, which counsel found to be superior to putting defendant on the stand. Given the evidence of guilt, the limited harm, if any, of the broken promise that defendant would testify, and given the court's instruction to the jury that it could not consider defendant's failure to take the stand in rendering its verdict, we find that defendant has not shown that there existed a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

In a last-minute Standard 4 brief, defendant argues that his statement to police and other evidence must be suppressed as the fruit of an illegal arrest and that counsel was ineffective for failure to investigate. Neither one of these arguments warrants reversal. Defendant's argument relative to an alleged illegal arrest is predicated on defendant's claim that he was arrested at his home without an arrest warrant having issued. The lower court record contains a felony arrest warrant executed by a magistrate, but it is dated the day after defendant was arrested. The trial testimony indicates that police went to defendant's residence and arrested him after the victim's mother, defendant's live-in girlfriend at the time, went to police after discovering sexually explicit photographs of her daughter on a digital camera used by defendant. The victim indicated to her mother that defendant took the pictures, defendant admitted to his girlfriend that he took the pictures, and the victim was interviewed, expressing that defendant took the photographs. The record is unclear whether the police actually entered the residence to arrest defendant, arrested him outside the home, or whether the police were given consent to enter the residence.

Trial testimony also reflects that a search warrant with respect to the home had been issued, although it is unclear exactly when it was issued. An arrest warrant is generally not required to accomplish a felony arrest so long as there is probable cause that a defendant committed a felony. *People v Johnson*, 431 Mich 683, 690-691; 431 NW2d 825 (1988). Here, on the basis of the record, the police had probable cause to believe that defendant had committed a felony. Further, only if we assume that police entered the home to arrest defendant, and did so without a warrant and without consent, does a potential Fourth Amendment violation arise. See *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007); *Johnson*, 431 Mich 691. On the existing record, we cannot definitively find a Fourth Amendment violation. Moreover, even if we made assumptions favorable to defendant, the police were conceivably faced with exigent circumstances, i.e., imminent destruction of child sexually abusive material,[1] giving rise to an exception to the Fourth Amendment warrant requirement. *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). Additionally, the victim's testimony, the testimony of the victim's mother, the testimony of an examining pediatrician, testimony concerning the digital camera taken by the victim's mother to police, and the incriminating photographs already in the possession of the police at the time of arrest, would not be fruits of the poisonous tree, and this evidence established defendant's guilt. Finally, the issue was not preserved below, and we hold that defendant has failed to establish a plain error affecting his substantial rights, nor has he shown that he is actually innocent or that the fairness and integrity of the proceedings were compromised. *Carines*, 460 Mich at 763-764.

With respect to the argument that counsel was ineffective for failure to investigate, defendant presents myriad rambling claims of instances of alleged ineffectiveness. Defendant claims that counsel failed to seek suppression of his statements to police, failed to file motions, including one to suppress the fruits of his alleged illegal arrest, failed to discover exculpatory medical evidence, failed to effectively cross-examine and impeach witnesses, and failed to request a continuance to investigate these matters. Much of defendant's time is spent on matters that relate more to the sufficiency of the evidence, which we find lack merit, and not on actual matters of ineffective assistance. Defendant's actual ineffectiveness arguments consist of speculation, do not find support in the record, and are legally unavailing. Defendant has not established deficient performance, nor prejudice. *Carbin*, 463 Mich at 599-600.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra

[1] Child sexually abusive material had already been found in the home by the victim's mother and defendant had been confronted with the evidence before she went to police, which could lead a reasonable officer to believe that defendant would attempt to destroy any other incriminating evidence as quickly as possible.